IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 394

In the Matter of the Application of DANIEL F. O'BRIEN and LEONARD CASSAT, and others named in the schedule annexed hereto,

Petitioners,

vs.

THEODORE H. LANG as Personnel Director of the Department of Personnel of the City of New York and as Chairman of the Civil Service Commission of the City of New York, GEORGE GREGORY, JR., and ANTHONY M. MAURIELLO, as Commissioners of the Civil Service Commission of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK.

WILLIAM GOFFEN,
Counsel for Petitioners,
160 Broadway,
New York 38, N. Y.

346 Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF CONTENTS.

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement	3
Reasons for Granting the Writ	6
Conclusion	7
Appendix A—Opinions	
Appellate Division	8
Special Term	15
Appendix B—Order	16

Table of Cases.

	PAGE
Borodkin v. *Kern*, 174 Misc. 339; aff'd. 260 App. Div. 914, aff'd. 285 N. Y. 732	4
Gilburt v. *Kroll*, 17 Misc. 2nd 409, 1 App. Div. 2nd 819, aff'd 2 N. Y. 2nd 896	7

Statute.

Title 28 of the United States Code, §1257, par. 3	2

Rule.

Rule of the Civil Service Commission, Rule 4.1.3	5

Other Authorities.

Constitution of the United States, Amendment 5	3
Constitution of the United States, Amendment 14	3

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK.

The petitioners pray that a writ of certiorari issue to review the order of the Court of Appeals, State of New York, entered in the above case on May 2d, 1963.

Opinions Below.

There was no opinion delivered in the Court of Appeals, State of New York, which affirmed the order of the Appellate Division of the State of New York, First Department.

whose opinion is reported in 18 App. Div. 2d (N. Y.) 140, 237 N. Y. Supp. (2) 960. The order of the Appellate Division reversed an order of the Supreme Court of the State of New York, at Special Term, New York County, which granted the petition in all respects. The opinion at Special Term is not reported.

Jurisdiction.

The order of the Court of Appeals, State of New York, was entered on May 29, 1963. The jurisdiction of this Court is invoked under Title 28 of the United States Code, 1257 (3).

Questions Presented.

Is it in the nature of *ex post facto* legislation and a deprivation of due process of law for a Civil Service Commission to fail forty-six lieutenants in the Police Department, City of New York, candidates in an examination for promotion to captain, after they had passed the examination, by raising the pass mark from 70% to 75% ten months after the holding of the examination?

Is it due process of law for the Court below to invalidate an official announcement of the examination with a required pass mark of 70% on the ground that it did not meet the requirement of a Rule of the Civil Service Commission that the announcement of the examination be published daily in full for at least one week while reinstating an earlier announcement of a 75% pass mark which likewise had not been published daily in full for at least one week?

Is it a denial of equal protection under the laws for the Court below to validate an announcement of an examination for the exclusive benefit of eleven candidates who

were permitted to participate in the examination by virtue of that announcement while holding that the announcement was void insofar as the petitioners are concerned?

Constitutional Provisions Involved.

No person shall "be deprived of life, liberty, or property, without due process of law; . . ." Constitution of the United States, Amendment 5.

No State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Constitution of the United States, Amendment 14.

Statement.

The forty-six petitioners, lieutenants in the Police Department of the City of New York, seek a judicial determination that having earned passing marks on the examination for promotion to Captain, they are entitled to placement upon the eligible list.

Petitioners were failed on the examination because the respondents (hereinafter referred to as the Commission) privately changed the official pass mark from 70% to 75% ten months after the examination. The petitioners were informed of the raised pass mark more than twelve months after they had taken the examination.

The question was presented in the petition to the Court of first instance whether the Commission's *ex post facto* increase of the pass mark constituted a deprivation of due process of law. The petition alleged:

> "26. The *ex post facto* increase of the passing grade from 70% to 75% constituted a deprivation of due process of law" (Record, folio 42).

Special Term, the Court of first instance, sustained the petitioners' contention and held:

"A fixing of a passing mark almost ten months after the examination was held is improper." (Record, folio 255).

However, the Appellate Division unanimously reversed the order of Special Term which had granted the petition in all respects. The Court of Appeals without opinion unanimously upheld the order of reversal.

The opinion of the Appellate Division observed:

> "The petitioners contend there was an *ex post facto* increase of the passing grade from 70% to 75%, and this constituted a deprivation of due process of law. . . .
>
> "The appeal thus poses an issue as to the power of Commission to vary a passing grade once it announces such grade by publication, and a subsidiary question whether any of such rights vested in petitioners under the original 70% notice that any alteration in the rating requirement constituted an unjust and illegal deprivation. Also, whether, as petitioners contend, there was in fact an *ex post facto* increase." (Record, folios 281, 283).

The examination was originally announced with the traditional pass mark of 70%. A second announcement corrected errors in the original announcement but restated the 70% pass mark. A third announcement changed the mark to 75% for the first time in the history of such examinations. However, the day before the examination, a fourth announcement reinstated the 70% passing grade. While the examination booklet specified 75%, the petitioners justifiably relied upon the notice given by the announcement which concededly determines the pass mark. *Borodkin* v. *Kern*, 174 Misc. 339, aff'd. 260 App. Div. 914, aff'd. 285 N. Y. 732.

To justify the reversal of Special Term, the Appellate Division voided the fourth announcement on a ground

never contended" the Commission; namely, that it did not comply with a Commission rule requiring publication "daily, in full for at least one week" (Rule 4.1.3). Indeed, the reduced period of publication shortly before the holding of the examination was consistent with the Commission's established practice.

The Court thereupon reinstated the prior passing mark of 75%, of which, the Court erroneously assumed, "due notice had been given" (Record folios 290, 291). The fact is that the 75% announcement was published in full for only six days. As appears from the issues of *The City Record* where the announcements were published, the six days of full publication were followed by a bare reference to the issues containing full publication.

The only announcement meeting the Court's construction of Rule 4.1.3, *supra*, was the second with eight days of full publication of a 70% pass mark.

The Appellate Division's invalidation of three 70% announcements to sustain a single 75% announcement which itself as a matter of public record was not published "daily, in full for at least one week", and the affirmance by the Court of Appeals, constitute a deprivation of due process of law.

While invalidating the final announcement so as to sustain the Commission's failing of the petitioners, the Appellate Division, as affirmed in the Court of Appeals, validated this announcement for the benefit of eleven other candidates who were permitted to file under this announcement, one of whom has recently been promoted to Captain. The validation of the final announcement, termed the Third Amended Notice, for the special benefit of the eleven candidates is apparent from a Commission affidavit annexed to its answer submitted in the Court of first instance, where it is said:

> "Thereafter, a 'Third Amended Notice' (Petitioners' Exh. 'E') was readvertised permitting other filings of applications of additional candidates who had in the meantime become eligible to take the examination since the insertion of the last advertisement. Eleven such persons were accommodated under this 'Third Amended Notice'." (Record, folio 142).

The opinion of the Appellate Division recited:

> "Commission pointed out that 812 applicants filed under the original notice, 78 filed thereafter under the 75% requirement, and 11 under the 'Third Amended Notice'." (Record, folio 280).

Despite the patent denial of equal protection in thus validating the final announcement for the eleven who filed under it while voiding it where the petitioners are concerned, the Court of Appeals affirmed the Appellate Division.

Reasons for Granting the Writ.

In the performance of their duties as high police officers, the petitioners are ever conscious of the constitutional rights of the individual. The instant petition raises serious questions of due process and equal protection determining the civil right of the officers themselves to advancement in their careers in the civil service.

In a case on all fours with the instant one, but where the Appellate Division and the Court of Appeals reached the opposite conclusion, Mr. Justice Walter expressed the shock to his sense of injustice as follows:

> "The fixing of a passing grade after an examination has been had and the papers graded strikes my mind as fundamentally unjust and as affected

with all the abhorrence usually felt for retroactive legislation or for the constitutionally prohibited ex post facto laws."

"I have had some difficulty in putting into words just why I feel it is unjust, and perhaps all I can say is that at least some persons go into an examination with the predetermined passing mark in mind and with the intention of beating that mark and relax their efforts after feeling that they have beaten it instead of continuing to do their very best until the end of the examination. But there are some questions in the law with respect to which a page of history is worth more than a volume of logic (New York Trust Co. *v.* Eisner, 256 U. S. 345, 349; Cardozo, Nature of Judicial Process, pp. 54, 55); and so, too, there are times when one's sense of justice is a better guide to decision than one's ability to reason." *Gilbert* v. *Kroll*, 17 Misc. 2nd 409; 1 App. Div. 2nd 819, aff'd 2 N. Y. 2nd 896.

The Court of Appeals of the State of New York, in its determination of the due process and equal protection issues presented by the instant case, has not acted in accord with the decisions of the Supreme Court of the United States.

Conclusion.

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

William Goffen,
Counsel for Petitioners.

Appendix A.

OPINION OF APPELLATE DIVISION.

STEVENS, J.:

This is an appeal from an order entered June 1, 1962, which granted petitioners' application and, *inter alia*, directed the Civil Service Commission (herein Commission) to accord to each petitioner the passing mark to which he is entitled in the written examination for promotion from Lieutenant to Captain, Police Department, City of New York.

This is a proceeding for an order under Article 78 of the Civil Practice Act directing Commission to recognize a passing mark of 70 percent on a promotional examination.

Prior to January 21, 1961, the date of the examination herein involved, petitioners were lieutenants in the Police Department and eligible to take an examination for promotion to the position of Captain. The original notice of examination stated applications would be received from October 5, 1960 through October 25, 1960, for the written test to be held January 21, 1961, and that a passing grade of 70% would be required for the written examination. The notice was published in "The City Record", the official journal of the City of New York, from October 5, 1960 to October 11, 1960. From October 11, 1960, to October 25, 1960, an "Amended Notice" of the examination was so published which likewise set forth a requirement for a passing grade of 70%.

During the period from December 12, 1960 through December 23, 1960, after many of the petitioners had filed, a "Second Amended Notice" was published which raised the required passing grade in the written test to 75%.

On January 20, 1961, the day before the examination, a "Third Amended Notice" appeared which stated the requirement for a passing grade to be 70%.

Appendix A.

On January 21, 1961, the day of the examination, a statement appeared on the cover page of the examination booklet that 75% was required on the written test.

These petitioners took the examination and received grades of between 69.1% and 73%. Pursuant to General Examination Regulation E.17.3 of the Commission, "Whenever the pass mark in the rating of a test . . . has been fixed in terms of a specific numerical score, a candidate who obtains a rating within any fractional part above the next lower whole number shall be deemed to have passed such test, subject, part or examination as the case may be." Thus all candidates who received a grade of 69.1% to 69.9% would have been deemed to have passed a written examination on which the pass mark is 70%.

The petitioners assert that in November, 1961, Commission unlawfully established a pass mark of 75% for the written examination. Commission asserts the publication of a 70% requirement in the "Third Amended Notice" which appeared one day prior to the examination was an error which was not discovered until November 1961, and after discovery Commission, on December 5, 1961, duly affirmed 75% to be the correct pass mark, and the insertion of 70% to have been an error.

Commission pointed out that 812 applicants filed under the original notice, 78 filed thereafter under the 75% requirement, and 11 under the "Third Amended Notice."

The official notices of failure were mailed to petitioners on or about December 28, 1961.

The petitioners contend there was an *ex post facto* increase of the passing grade from 70% to 75%, and this constituted a deprivation of due process of law. Also, the action of Commission was unjust, arbitrary, capricious and illegal.

Special Term held the "fixing of a passing mark almost ten months after the examination is improper" and granted petitioners the relief sought.

Appendix A.

On appeal, Commission urges "[t]he petition should properly have been dismissed. The Commission had the power and the duty to correct its own clerical error and in the absence of bad faith or palpable illegality, its judgment and decision relating to the conduct of a civil service examination should not be disturbed."

Petitioners reassert the contentions advanced below. A brief *amici curiae* was submitted in support of Commission's position by certain candidates who passed the Police Captain's Promotion Examination.

The appeal thus poses an issue as to the power of Commission to vary a passing grade once it announces such grade by publication, and a subsidiary question whether any or such rights vested in petitioners under the original 70% notice that any alteration in the rating requirement constituted an unjust and illegal deprivation. Also, whether, as petitioners contend, there was in fact an *ex post facto* grade increase.

Commission has the power to prescribe, amend and enforce suitable rules to carry out the provisions of the Civil Service Law and of ~~Section 6, Article 5, New York~~ State Constitution, including rules for examinations, appointments, promotions, transfers, etc. (Civil Service Law, §20; Rule II, Rules and Regulations City Civil Service Commission). Such rules when properly adopted shall have the force and effect of law (Civil Service Law, §20, subd. 2; *Matter of Woods* v. *Finegan*, 286 App. Div. 271; *Cazzivoglio* v. *Hamlin*, 202 N. Y. S. 2d 402, aff'd 13 A D 2d 614, appeal den. 13 A D 2d 899).

Pursuant to the power vested in it Commission promulgated Rule 4, Section 5, paragraph 3 of such Rule provides in part "[u]nless otherwise specified by resolution or regulation of the commission, candidates must attain a final examination rating of not less than seventy per cent in an examination in order to be placed upon an eligible list for certification and appointment." (See also, Regulation E. 17.1)

Appendix A.

Commission in its initial notice did indicate that a passing rating of 70% was essential. Subsequent thereto, in December 1960, and as a result, at least in part, conversations with the then Police Commissioner who expressed concern that this rating was less than the 75% established for the Sergeants written examination Commission did otherwise specify, and directed that the pass mark be set at 75% instead of the 70% already advertised. This it had the power to do (Rules and Regulations, Civil Service Commission, Rule 4.5.3). Thereafter it extended the time during which applications could be filed.

The director of examinations also has the power to fix the required passing rating in any test, subject or part of an examination "*at not later than the time of the holding thereof*" (Rule 4.5.3); (emphasis supplied.) This power is properly vested in the director (New York Charter, Ch. 35, §813; Rule II, Rules and Regulations, City Civil Service Commission).

Since Commission has the power to alter the passing rating required prior to the examination, it follows there is no vested (i.e., fixed, accrued, settled) or absolute right in petitioners resulting merely from a publication of the passing grade required. Thus insofar as the original, the amended, or even the "Second Amended Notice" is involved, no right vested upon publication.

Commission has power to prescribe examinations for a competitive class, to issue an announcement setting forth the minimum qualifications required and it is required to "advertise such examination in such manner as the nature of the examination shall require" (Civil Service Law, §50; Rules and Regulations, City Civil Service Commission, Rule II). "The date of the first assembled test in a promotion examination [as here involved] shall be stated in the announcement of examination" (Regulations, City Civil Service Commission, E.12.1). "Such announcement shall be published daily, in full for at least one week prior to the final date for the receipt of applications in The City Rec-

ord"; and in such other publications as the director may designate . . . announcements shall also be posted conspicuously in the offices of the department of personnel" Rule 9.1.3, (Rules and Regulations, City Civil Service Commission). "The date of all subsequent tests in promotion examinations and all tests in open competitive examinations shall be published in The City Record and conspicuously posted in the offices of the department of personnel for a period of not less than ten days in advance of the scheduled date of the test. The personnel department, however, reserves the right to change the date of any test" (*ibid*, Regulation E.13.2). Such publication and posting constitute public notice (*ibid*, Regulation E.13.3).

Under the Rules and Regulations of Commission the appearance, as a rating, of 70% in the "Third Amended Notice" of January 20, 1961, one day before the examination, did not conform to its own requirements of publication for at least one week prior to the examination and was ineffectual to change the passing rating of 75%, of which due notice had been given. It could hardly be argued, if such notice of January 20, 1961, had contained a rating of 80%, that petitioners would have been bound thereby, since it did not conform to Commission's existing rules. Moreover, the raising of the requirement to 75% had been duly and properly passed and published so that all parties were on notice, actually or constructively, of the change. If any doubt existed it must have been dispelled by the appearance of the required rating on the examination booklet for all of the published notices directed the applicants' attention to the question booklet. The purpose of publication is to afford reasonable notice of the requirements of a proposed examination. Commission recognizes this by its own requirement of at least one week's publication of notice.

Commission has wide discretion in fixing the minimum requirements for admission to an examination (*Matter of Wirzberger* v. *Watson*, 305 N. Y. 507; *Chapin* v. *Schechter*, 23 Misc. 2d 190, aff'd 13 A D 2d 473; *Jacob* v. *Schechter*, 22 Misc. 2d 549) and in the absence of bad faith, corrupt,

or illegal action, or action erroneous in law, it should not be interfered with (*cf. Matter of Kinnerney* v. *Hornell Civil Service Comm.*, 262 App. Div. 39). Commission also has the power to vary the pass mark. (Rule 4.5.3; Regulation E.17.1, Rules and Regulations, City Civil Service Commission.)

Merit is the basis for appointment and promotion in competitive civil service, and the ascertainment of such merit, so far as practicable, is to be by competitive examination. (State Constitution, Art. V, §6; Civil Service Law, §§44, 52; Rules of City Civil Service Commission, Rule 5.4.5.) All applicants for the January 21, 1961, examination were treated exactly alike, with all being required to meet the same minimum requirements, including the 75% pass mark. Thus it is not for us to substitute our judgment for that of Commission (*cf. Matter of Kornbluth* v. *Reavy*, 261 App. Div. 60) where its action is clearly not illegal or unreasonable.

Petitioners, after asserting the 70% pass mark was the correct one, charge that Commission illegally, arbitrarily and capriciously changed the passing grade after the holding of the examination.

Commission asserts the January 20, 1961, publication of 70% was error; neither party discovered the error until November 1961, and Commission immediately, or in a very short time, on December 5, 1961, duly affirmed the 75% to be the correct pass mark, and the insertion of 70% to be error. Commission "at any time prior to the establishment or during the existence of an eligible list, may correct any manifest error or mistake made in connection with an examination; on its own initiative [as was done here] or in the granting of a claim of manifest error or mistake. The nature of such manifest error or mistake shall be set forth in its minutes" (Rule 4.5.4, Rules of Commission).

The error complained of here in no wise affected the competitive nature of the examination, nor did it discriminate between one applicant or group of applicants

over the other. The error was corrected prior to the promulgation of the eligible list on March 7, 1962, and before the failure notices were mailed out on or about December 28, 1961. The record is barren of any indication of improper motives or bad faith on the part of the Commission and the error may properly be corrected (*cf. People ex. rel. Finnegan* v. *McBride*; 226 N. Y. 252). There is nothing to show Commission knew of or anticipated the effect of the correction on petitioners, or acted with any intention of particularly or unfairly affecting any one of the applicants. The power of correction would seem to be limited only where fraud, illegality or bad faith is shown, or such ambiguity exists that it is impossible to have a sufficiently objective standard for determination (*cf. Matter of Gruner* v. *McNamara*, 298 N. Y. 395; *People ex rel. Finnegan* v. *McBride*, *supra*; *Matter of Blumenthal* v. *Morton*, 273 App. Div. 497, aff'd 298 N. Y. 563). And where the announcement of examination failed to state a requirement of an eyesight standard of 20/40 in each eye, it was held the State Civil Service Commission was not estopped from fixing such eyesight standard after petitioners successfully passed the written examination and had met the experience qualifications for the position (*Matter of Eisig* v. *Conway*, 198 Misc. 770; see also, Rule 4.3.6; Regulations E.16.2; E.21.1).

Matter of Dowling v. *Brennan* (284 App. Div. 563), cited by petitioners, is not to the contrary, for that case dealt with a failure of the Commission to provide material information to applicants in advance of the examination, and its failure to give objective assurance of the application of certain factors in the absence of a showing that it was not possible or impracticable to do so. In *Matter of Gilbert* v. *Krull*, 17 M. 2d 409, aff'd 1 A. D. 2d 819, aff'd 2 N. Y. 2d 896, there was a raising of the passing grade in a practical test in violation of a by-law of defendant, without previous notice to the petitioners, and after it had knowledge of their identities and had graded their papers.

Appendix A.

There was no vested right in petitioners to a 70% pass mark and when properly done, Commission, as previously pointed out, could raise such mark to 75% (*cf. Matter of Kornblith* v. *Reach*, 261 App. Div. 60). The pass mark of 75% was properly fixed. The single publication on January 20, 1961, was ineffective to change such rating for the reasons heretofore stated. If any error existed it was within Commission's power to correct the same and such power existed at the time the correction was made.

The order appealed from is reversed on the law, and the petition dismissed, without costs to either party.

Rabin, J. P., McNally, Steuer and Noonan, JJ., concur.

OPINION OF SPECIAL TERM.

Gold, J.: This is an article 78 proceeding to direct the respondents to recognize the passing mark of 70 per cent. on a promotional examination. On October 5, 1960, the respondents announced an examination of promotion and set forth a passing mark of 70 per cent. on the written examination to be held on January 21, 1961. On December 12, 1960, a second amended notice appeared in "The City Record" amending the passing mark from 70 per cent. to 75 per cent. Thereafter on January 20, 1961, a third amended notice appeared reinstating the 70 per cent. passing mark. On January 21, 1961, the day of the examination, although the last passing mark announced was 70 per cent. a statement appeared on the cover page of the examination booklet stating that 75 per cent. was required on the written test. In November, 1961, the respondent held that the passing mark was 75 per cent., stating that the third notice of January 20, 1961, was an error and that they fixed 75 per cent. as the passing mark (petitioners' exhibit "G"). A fixing of a passing mark almost ten months after the examination was held is improper. Accordingly, the petitioners are entitled to the relief sought. The motion is granted.

Appendix B.

ORDER.

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of May in the year of our Lord one thousand nine hundred and sixty-three, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur May 29, 1963.

No. 80.

In the Matter of the Application of DANIEL F. O'BRIEN & ors., For an Order &c.,

Appellants,

vs.

THEODORE H. LANG, as Personnel Director of the Department of Personnel of the City of New York &C., & ors., &c.,

Respondents.

BE IT REMEMBERED, That on the 20th day of March, in the year of our Lord one thousand nine hundred and sixty-three, Daniel F. O'Brien & ors., the appellants in this cause,

came here unto the Court of Appeals, by William Goffen, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Theodore H. Lang, as Personnel Director of the Department of Personnel of the City of New York &C., & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. William Goffen, of counsel for the appellants, and by Mr. John A. Murray, of counsel for the respondents, and by Mr. Chester S. Mandel, of counsel for the amici curiae, and after due deliberation had thereon, did order, and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded with according to law.

Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced

according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, May 29, 1963.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

(SEAL)

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JOHN F. DAVIS, CLERK

(37251)

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LEO A. LARKIN,
Corporation Counsel,
Attorney for Respondents,
Office and Post Office Address:
Municipal Building,
Borough of Manhattan,
New York 7, New York.

SEYMOUR B. QUEL,
JOHN A. MURRAY,
of Counsel.

INDEX

	PAGE
STATEMENT	1
THE QUESTION PRESENTED	2
ARGUMENT:	
The petition was properly dismissed. No substantial federal question is presented herein since the Commission had both the power and the duty to correct its own clerical error	3
CONCLUSION	6

Cases Cited

Matter of Blumenthal v. Morton, 273 App. Div. 497 (1st Dept., 1948), 298 N. Y. 563 (1948)	3
People ex rel. Cayidi v. Creelman, 150 App. Div. 746 (1st Dept., 1912)	4
Matter of Firshein v. Reavy, 263 App. Div. 490 (3rd Dept., 1942), 289 N. Y. 712 (1942)	4
People ex rel. Finnegan v. McBride, 226 N. Y. 252 (1919)	4
Matter of Gilbert v. Kroll, 17 Misc. 2d 409 (Sup. Ct., N. Y. Co., 1957), 1 AD 2d 819 (1st Dept., 1956), 2 N. Y. 2d 896 (1957)	5
Matter of Gruner v. McNamara, 298 N. Y. 395 (1949)	4
People ex rel. Hotchkiss v. Board of Supervisors, Broome County, 65 N. Y. 222 (1875)	4
Matter of Sloat v. Board of Examiners, 274 N. Y. 367 (1937)	4

Statutes and Rules Cited

United States Constitution, Articles 5th and 14th	3
Rule 4.5.4. of the Rules of the Civil Service Commission	4
Rule 4.1.3. of the Rules of the Civil Service Commission	4

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The petitioners seek to have this Court review by writ of certiorari, an order of the Court of Appeals of the State of New York, entered May 29, 1963 (Pet. Appendix B, p. 16) which unanimously affirmed without opinion a final order of the Appellate Division, First Department, entered February 21, 1963 which had (1) unanimously reversed on the law; an order of the Supreme Court, New York County (GOLD, *J.*); entered June 1, 1962, granting the application in the nature of *mandamus* of the 46 petitioners, under Article 78 of the Civil Practice Act and directing, *inter alia* that

the Commission accord to each petitioner the passing mark to which he is entitled in the written examination for promotion from Lieutenant to Captain, Police Department, City of New York, held on January 21, 1961 and (2) had dismissed the petition.

The affirmance in the Court of Appeals is reported in 13 N Y 2d 688 (1963). The opinion of the Appellate Division, First Department, is reported in 18 A D 2d 140.

The Question Presented

The primary issue presented is whether the respondent Commission has the power and, indeed, the duty to correct a clerical error of one of its employees upon discovery of such error, or whether it is to be forever foreclosed from rectifying such error. The error in question was set forth in a one day insertion of a readvertisement of examination for promotion to Captain, Police Department, which was published in the City Record on January 20, 1961, the day before the scheduled examination. This error resulted in the appearance of an amended notice which set forth an incorrect expression of the Commission's final decision as to the passing mark. The readvertisement contained a required passing grade of "70%" in error, instead of an authorized required passing grade of "75%" which had previously been fixed by resolution of the Commission. On the day of the examination, January 21, 1961, the printed material on the two cover pages of the examination booklet, which takes approximately one week to prepare, set forth in two places the fact that the required passing grade was "75%" on the written test. The error was discovered or brought to the Commission's attention some ten months later in November, 1961 and the Commission at a meeting held December 5, 1961 (1) admitted the error and (2) "reaffirmed the 75% passing mark in the written test for examination #8978 for Promotion to Captain, P. D."

The Appellate Division, First Department, in its opinion of reversal *per* STEVENS, *J.*, (18 A D 2d 140) found that (*id.*, p. 147) the "single publication on January 20, 1961 was ineffective" to change the 75% rating previously fixed by the Commission. The Court held further that in any event "[i]f any error existed it was within (the) Commission's power to correct the same and such power existed at the time the correction was made."

ARGUMENT

The petition was properly dismissed. No substantial federal question is presented herein since the Commission had both the power and the duty to correct its own clerical error.

The petition (pp. 3-5) asserts a deprivation of "* * * property, without due process of law" within the meaning of the expression as set forth in Constitution of the United States, Articles 5th and 14th, because the Commission at a "public" meeting held December 5, 1961, took action to reaffirm the "75%" passing mark in the examination in question. Each of the petitioners received grades below 73.1% and contrary to counsel's assertion (p. 2) none of them were ever graded as having "passed the examination." On December 28, 1961, each petitioner received a failure notice. The corrected clerical error on which the petitioners rely to achieve a passing grade was caused by an employee of the Commission who was charged with the duty of inserting the readvertisement in the City Record. The employee prepared a sample copy of such advertisement and inadvertently neglected to note the change of the 70% rating to 75% pursuant to the Commission resolution of December 5, 1960.

The Commission's authority to correct its own error has been carefully defined and limited by the courts of this state.

In *People ex rel. Finnegan* v. *McBride*, 226 N. Y. 252 (1919), the Court of Appeals in an opinion *per* POUND, *J.*, recognized (p. 259) that an error "may be corrected by setting it aside if it was the result of illegality, irregularity in vital matters or fraud", citing *People ex rel. Hotchkiss* v. *Board of Supervisors of Broome County*, 65 N. Y. 222 (1875). The Court observed further that action so taken must "be for cause, with good reasons and proper motives for the correction of improper action." Moreover, the Commission's authority to correct its own error prior to the establishment of an eligible list is wider in scope and limited only by a showing of bad faith or palpable illegality. *Matter of Greiner* v. *McNamara*, 298 N. Y. 395 (1949); *Matter of Stout* v. *Board of Examiners*, 274 N. Y. 367 (1937); *Matter of Blumenthal* v. *Morton*, 273 App. Div. 497 (1st Dept., 1948), aff'd 298 N. Y. 563 (1948); *Matter of Fischein* v. *Reavy*, 263 App. Div. 490 (3rd Dept., 1942) aff'd 289 N. Y. 712 (1942); *People ex rel. Caridi* v. *Creelman*, 150 App. Div. 746 (1st Dept., 1912). Under Commission Rule 4.5.4, the respondents had the authority to correct any mistake "on its own initiative" at "any time prior to the establishment or during the existance of an eligible list."

No illegality is established by the erroneous statement (Br., p. 5) that the announcement of the 75% passing mark "was not published 'daily, in full for at least one week.'" The 75% passing mark was in fact published for one full week (excluding Sunday) starting December 12, 1960, and noticed for seven calendar days thereafter thus fully complying with Commission Rule 4.1.3, which specifies that a notice be published "in full for at least one week." Nor can these petitioners derive any benefit from the fact that 11 candidates were permitted to compete in the examination on applications filed on January 20, 1961 pursuant to the erroneous amended notice. These candidates, like the petitioners and the remaining 844 candidates were all graded on the basis of a 75% passing mark. It follows therefore

that the error did not affect the competitive nature of the examination nor did it favor one group of candidates over another. No showing is made of any prejudice to the 46 candidates in question other than the fact that they failed to achieve the passing grade properly fixed prior to the examination by Commission resolution.

Finally, a close inspection of *Matter of Gilbert* v. *Kroll*, 17 Misc 2d 409 (Sup. Ct., N. Y. Co., 1955), aff'd 1 AD 2d 819 (1st Dept., 1956), aff'd 2 NY 2d 896 (1957) cited (Br., p. 6) as being "on all fours" with the instant case, fails to sustain that conclusion. In the *Gilbert* case the eight petitioners competed in a licefise examination for the position of principal, elementary day school. There, the "hurdle" type examination was divided into two parts. Part one was a "supervision" test and unsuccessful candidates were barred from competing in a subsequent written examination. The board, unlike the Commission in the case at bar, fixed no passing grade prior to the examination. Each of the eight petitioners were graded between 60 and 65% on the test in question. After the papers were graded, however, the board fixed a passing grade of 65% and failed each of the petitioners relying solely on a by-law which permitted it to fix the passing grade on *written tests* "after the answer papers had been rated but before the identity of the applicants [had] become known to the board or any member of its staff."

At Special Term, the petitioners pointed out that other by-laws of the board defined a supervision test as a practical test and provided further that "the passing grade on a practical test, unless otherwise determined by the board, shall be 60%." The Court there ruled that these by-laws were controlling rather than the one relied on by the board, and struck down the action of the board (17 Misc 2d at p. 410) in "fixing a passing grade after an examination has been had and the papers graded." The Commission, in the proceeding at bar, unlike the board in the *Gilbert* case, was not changing a previous decision or even attempting to

rectify a previous omission, but rather correcting a previous error. Therefore, the fact that the examination had been held when the error was corrected is just not pertinent to the facts presented.

Special Term pointed out further, in *Gilburt*, that one candidate in the same examination who had been graded at 60.25%, had successfully prosecuted an appeal to the New York State Commissioner of Education who ordered that he be rated as having passed the test. This decision, according to the Court, created a situation (*id.*, p. 412) where "different candidates upon one examination [were] treated unequally." The Court then concluded that "[s]urely that result cannot be allowed to stand if there be any legal means of affording petitioners some relief."

Moreover, in *Gilburt*, the petitioners eventually sustained their favorable ruling at Special Term by arguing in the Court of Appeals (*Matter of Gilburt*, Resp. Br., pp. 7-18) that "[t]here was *no error* in the original fixation of the 60% pass mark, *nor any other factual basis* for changing it to 65% after the rating of the answers" (*emphasis supplied*). In the case at bar there was obvious error and a factual basis for correcting it.

CONCLUSION

The petition for certiorari should be denied.

September 18, 1963

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Attorney for Respondents.

SEYMOUR B. QUEL,
JOHN A. MURRAY,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 394

In the Matter of the Application of DANIEL F. O'BRIEN, and LEONARD CASSAT, and others named in the schedule annexed hereto,

Petitioners,

vs.

THEODORE H. LANG as Personnel Director of the Department of Personnel of the City of New York and as Chairman of the Civil Service Commission of the City of New York, GEORGE GREGORY, JR., and ANTHONY M. MAURIELLO, as Commissioners of the Civil Service Commission of the City of New York,

Respondents.

PETITIONERS' REPLY BRIEF.

Table of Contents.

PAGE

POINT I.—The record presents substantial questions for the determination of the Supreme Court 1

POINT II.—The petition should be granted in the public interest as well as in the petitioners' interest 3

POINT III.—Conclusion 5

TABLE OF CASES

Borodkin v. *Kern*, 174 Misc. 339, aff'd 260 App. Div. 914, aff'd 285 N. Y. 732 1

Gilburt v. *Kroll*, 17 Misc. 2nd 409, aff'd 1 App. Div. 2nd 849, aff'd 2 N. Y. 2nd 896 2

People ex rel Finnegan v. *McBride*, 226 N. Y. 252 3

CIVIL SERVICE COMMISSION RULES AND REGULATIONS.

Rule 5.3.19 1

Rule 4.5.4 2

Rule 4.1.3 2

Examination Regulation E. 17.3 3

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Respondents.

PETITIONERS' REPLY BRIEF.

Respondents have distorted the record in an effort to evade the constitutional issues presented.

POINT I.

The record presents substantial questions for the determination of the Supreme Court.

At Special Term, the respondents argued that the pass mark was determined by the examination booklet, not by the announcement of the examination. Properly overruled in this contention,[1] they adopted the tack in the Appellate Division that all the case involved was the Commission's

[1] *Borodkin v. Kern*, 174 Misc. 339, aff'd 260 App. Div. 914, aff'd 285 N. Y. 732. Commission Rule 5.3.19.

right to correct a "clerical"[1] error. Indeed, the record does not support the Commission's contention of error[2] and the Commission's verified answer alleges:

> "Fifteenth: That the utilization of the results of an examination as one of the elements in establishing a passing mark for an examination is a recognized practice in the fields of education and personal testing and is a reasonable and proper exercise of the discretion of the Respondent, the City Civil Service Commission and its duly authorized employees and officials."[3]

The Appellate Division stated, "*If* any error existed it was within Commission's power to correct the same. . . ." (Italics supplied.) However, it did not find that the 70% passing mark was an error. Nor did it concur with respondents' abandoned argument at Special Term that the examination booklet rather than the announcement determined the pass mark. The Appellate Division's reversal of Special Term's determination in favor of the petitioners was based upon a contention never urged by the respondents. The reversal was achieved by holding the fourth announcement void because it was not "published daily, in full for at least one week."[4] By so holding, the Appellate Division

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[1] Actually, Commission Rule 4.5.4 empowers the Commission to correct "manifest" error.

[2] The explanation in the letter of the Director of Examinations that "an 'original' notice of examination bearing the 70% pass mark was incorrectly published" (Record, folio 121) is belied by comparison of the fourth and original notices. Such comparison reveals three major differences between the two notices.

[3] Record, folios 132, 137.

In view of this allegation, there seems no basis for the respondents' attempt at pages 5 and 6 of their brief to distinguish *Gilbert v. Kroll*, 17 Misc. 2nd 409, aff'd App. Div. 2nd 819, aff'd 2 N. Y. 2nd 896 on the ground that the present change of pass mark reflected correction of an error.

[4] Commission Rule 4.1.3. Folios 289-291.

(1) sustained the Commission's *ex post facto* increase in the pass mark after the results of the examination were known and ten months after it was held,[1] (2) struck down a 70% notice because it was not published daily, in full for at least one week so as to reinstate the preceding 75% notice[2] although it, too, was not published daily, in full for at least one week,[3] and (3) permitted the 70% notice to stand for the exclusive benefit of eleven candidates whose participation in the examination depended entirely upon the 70% notice[4] while striking it down to fail the petitioners[5] after they had earned passing grades.[6]

POINT II.

The petition should be granted in the public interest as well as in the petitioners' interest.

As asserted at page 3 of the respondents' brief, each of the petitioners received grades below 73.1% on the written test. Their actual range varied from 69.1% to 73.1%.[7] Concededly, none of the participants in the examination received grades between 73.1% and 74%.[8] Professor

[1] Record, folios 42-143, 144. An Appellate Division holding that the Commission might correct such an error ten months after an examination would conflict with the doctrine of finality of administrative decisions. *People ex rel. Finnegan v. McBride*, 226 N. Y. 252.

[2] Record, folios 290, 191.

[3] It is impossible to fathom the logic of respondents' contention at page 4 of their brief that "one full week" excludes Sunday.

[4] Record, folios 142, 143, 280, 281.

[5] Record, folios 206, 207.

[6] Record, folios 46-51.

Pursuant to Commission Examination Regulation E 17.3, whenever the pass mark is a specific numerical score, a candidate obtaining a rating within any fractional part above the next lower whole number is deemed to have passed.

[7] Record, folios 46-51.

[8] Record, folio 36.

Edward Ladenheim, Professor of Mathematics at Brooklyn Polytechnic Institute, has computed the probability of such an hiatus in grades just before the pass mark with unmanipulated marking to be approximately one in one hundred thousand. Moreover, there was a similar hiatus just below the pass mark in the preceding Captain examination and Professor Ladenheim has computed the probability under normal rating of the occurrence of such an hiatus on these two successive examinations to be approximately one in two thousand billion.

Thus, there is scientific confirmation that the respondents manipulated the eligible list after it was prepared, although the exact manner and full extent of manipulation is unknown. This manipulation is in addition to the change in the pass mark ten months after the examination.

The mark on the written examination reflected only 70% of the entire test mark.[1] The remaining fifty per cent consisted of the record for performance and seniority.[2] As a number of the petitioners had superior performance records, the average of their performance and seniority ratings with their marks on the written test entitled them to higher placement on the eligible list than certain of the candidates who made the list. Such petitioners have thus proven themselves better qualified for promotion to captain than some of those on the promotion list and their exclusion from the promotion list through *ex post facto* change in the pass mark is a denial of due process.

The present case, therefore, in addition to presenting the reasons for granting the writ stated at page 6 of the Petition relating to the civil right of the petitioners to promotion on a merit basis, also involves the right of the public to the services of the best qualified civil service personnel. Accordingly, the public interest would be served by the granting of the Petition.

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[1] Record, folios 61, 62.

[2] Record, folios 61, 62.

POINT III.

Conclusion.

It is respectfully submitted that the important issues presented of due process and equal protection warrant the intervention of the Supreme Court in the public interest.

Respectfully submitted,

WILLIAM GOFFEN,
Counsel for Petitioner.